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THE HONORABLE THERESA L. FRICKE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UTHERVERSE GAMING LLC,

Plaintiff,

v.

EPIC GAMES, INC.,

Defendant.

Case No. 2:21-cv-00799-RSM-TLF

**DEFENDANT EPIC GAMES, INC.'S
OBJECTIONS TO REPORT AND
RECOMMENDATION (ECF NO. 371)**

LCR 7 Noting Date: January 26, 2024

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. LEGAL PRINCIPLES	2
III. ARGUMENT	2
A. Ms. Riley Does Not Establish Baseline Technological Comparability.	2
B. Ms. Riley Fails to Apportion Damages.....	3
C. The R&R Errs by Allowing Reliance on Ms. Riley’s Supposed “Comparable Transactions.”	5
IV. CONCLUSION.....	6

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Adams v. Elfo</i> , No. C19-1263-JCC, 2020 WL 1929375 (W.D. Wash. Apr. 21, 2020).....	5
<i>LaserDynamics, Inc. v. Quanta Comput., Inc.</i> , 694 F.3d 51 (Fed. Cir. 2012).....	3
<i>MLC Intell. Prop., LLC v. Micron Tech., Inc.</i> , 10 F.4th 1358 (Fed. Cir. 2021)	4
<i>Omega Pats., LLC v. CalAmp Corp.</i> , 13 F.4th 1361 (Fed. Cir. 2021)	4
<i>Pelican Int’l, Inc. v. Hobie Cat Co.</i> , No. 3:20-CV-02390-RSH-MSB, 2023 WL 2130379 (S.D. Cal. Feb. 10, 2023).....	5
<i>Uniloc USA, Inc. v. Microsoft Corp.</i> , 632 F.3d 1292 (Fed. Cir. 2011).....	5
<i>VirnetX, Inc. v. Cisco Sys., Inc.</i> , 767 F.3d 1308 (Fed. Cir. 2014).....	5

Other Authorities

Fed. R. Civ. P. 26(a)(2)(B)(i).....	3
Fed. R. Civ. P. 72(a)	2
Fed. R. Evid. 702	2

1 Defendant Epic Games, Inc. (“Epic”) respectfully objects to the Report and
2 Recommendation concerning Epic’s Motion to Exclude the Testimony of Utherverse Gaming
3 LLC’s (“Utherverse”) damages expert, Michele Riley, issued on December 26, 2023 (“R&R”).
4 Dkt. 371. Epic moved to exclude Ms. Riley’s royalty rate opinions. Dkt. 309. The R&R
5 recommends denying Epic’s motion in its entirety. Dkt. 371.

6 Epic objects to the R&R on the following grounds:

7 1. The R&R erroneously recommends the Court find that Ms. Riley demonstrates
8 the required baseline technological comparability between the license agreement she relies on
9 and the technology at issue in this case. The record does not support such a finding and holding
10 otherwise on this record would be contrary to binding Federal Circuit precedent.

11 2. The R&R does not address Epic’s motion to exclude Ms. Riley’s royalty rate
12 opinion for failing to apportion damages. Adopting the R&R, and allowing Ms. Riley to present
13 a damages theory that fails to apportion damages, would be contrary to established Federal
14 Circuit law.

15 3. The R&R’s finding that certain “comparable transactions” would inform the
16 starting point of a royalty rate is clearly erroneous because those transactions are not patent
17 licenses and are in no way economically or technologically comparable to the facts of this case.

18 **I. INTRODUCTION**

19 In calculating reasonable royalty damages, Utherverse’s damages expert, Michele Riley,
20 relies heavily on the Ephere License, which is a license to a patent not at issue in this case, that
21 was entered into by a different company than Epic, and relates to a different technology and
22 product than the technology accused of infringement in this case. Ms. Riley relies on the royalty
23 rate in the Ephere License to inform the outcome of a hypothetical negotiation between Epic and
24 Utherverse (and therefore the calculation of her reasonable royalty damages). In an attempt to
25 buttress her opinion, Ms. Riley also points to various other transactions that are even further
26 afield. In each step of her analysis, Ms. Riley fails to do what she is required to do under well-
27 established Federal Circuit law for her opinions to be admissible.

Ms. Riley provides no legally sufficient technological comparison between the Ephere License and the Asserted Patents, a requirement that the Federal Circuit has confirmed must be met for testimony to be admissible under Federal Rule of Evidence 702. Failure to apply this Federal Circuit requirement would be error. It would also be error to accept, as the R&R does, Ms. Riley's failure to explain why the royalty rate in the allegedly comparable license reflects "built-in apportionment," or how it compares to the Asserted Patents and the Accused Events. Moreover, Ms. Riley's attempt to shore up her deficient opinion by paying lip service to "other comparable transactions" should also have been rejected, as permitting an expert to rely on such evidence for apportionment is also contrary to controlling law.

The R&R should not be adopted. Instead, Epic's motion to exclude should be granted in full.¹

II. LEGAL PRINCIPLES

A district court has jurisdiction to review a magistrate judge's report and recommendation on non-dispositive issues and must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). The legal principles underlying the admissibility of expert opinions relying on license agreements and relating to apportionment are laid out in Epic's motion, Dkt. 309, and its reply in support of that motion, Dkt. 355, which Epic incorporates by reference.

III. ARGUMENT

A. Ms. Riley Does Not Establish Baseline Technological Comparability.

As the R&R acknowledges, in order to rely on an existing license agreement, an expert must establish baseline technological comparability between the technology licensed in that agreement and the patents-in-suit. R&R at 9-10. The R&R clearly errs, however, in its determination that Ms. Riley "met a showing of *baseline* comparability between the technology related to the Ephere License and the Asserted Patents." R&R at 8.

¹ If this Court rules in Epic's favor on the merits of the '605 and '071 summary judgment motions, it need not resolve this objection.

1 *First*, the R&R’s conclusion that Ms. Riley establishes baseline comparability is
 2 premised on Ms. Riley’s purported analysis of the technologies. R&R at 5,² 8. But as Epic
 3 raised in its briefing, Ms. Riley is an economist without the requisite technical training, and Ms.
 4 Riley admitted she does not have the expertise required to opine on technological comparability.
 5 See Dkt. 309 at 6, 8; Dkt. 355 at 3. Utherville did not dispute Ms. Riley’s lack of qualifications.
 6 See generally Dkt. 324.

7 *Second*, even considering Ms. Riley’s purported analysis of the technologies, that
 8 analysis never actually compares the technology licensed in the Ephere License to the Asserted
 9 Patents. Dkt. 309 at 8-9; R&R at 8 (citing Dkt. 327, Ex. A at ¶¶ 270-274). Rather, as the R&R
 10 notes, those paragraphs discuss the companies involved in the agreements and the general fields
 11 in which they compete. *Id.* As Epic explained in its briefing, such surface-level observations
 12 cannot establish technological comparability. See Dkt. 309 at 8; Dkt. 355 at 3-4.

13 A district court must exclude opinion unsupported by a technological comparability
 14 analysis. See *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 79-80 (Fed. Cir. 2012)
 15 (district court erred in allowing expert to rely on licensing program without establishing
 16 technological comparability, noting “alleging a loose or vague comparability between different
 17 technologies or licenses does not suffice”). The R&R fails to cite any credible evidence that
 18 would allow such a finding, and thus its conclusion (and recommendation) is clearly erroneous.

19 **B. Ms. Riley Fails to Apportion Damages.**

20 Even if Ms. Riley does demonstrate baseline technological comparability of the Ephere
 21 License (she does not), Epic moved to exclude her royalty rate opinion for another independent
 22

23 ² The R&R credits Utherville’s reference to an alleged conversation between Ms. Riley and Dr.
 24 Rosenberg, Utherville’s technical expert, as a basis for Ms. Riley’s understanding of what the
 25 Asserted Patents cover. R&R at 5. But the R&R does not cite any opinion from Dr. Rosenberg
 26 that the technology licensed in the Ephere License is technologically comparable to the Asserted
 27 Patents. As Epic made clear in its briefing, Dr. Rosenberg never disclosed such an opinion, and
 28 Ms. Riley never claimed to rely on such an opinion in her reports. Dkt. 309 at 10; Dkt. 355 at 8.
 Therefore, neither Ms. Riley nor Dr. Rosenberg can offer such an opinion at trial. See Fed. R.
 Civ. P. 26(a)(2)(B)(i).

1 reason: Ms. Riley fails to apportion damages. To ensure damages are properly tethered to the
2 invention—and to not overcompensate the patent owner by allowing it to capture the value of
3 non-patented features—a reasonable royalty “must reflect the value attributable to the infringing
4 features of the product, and no more.” *MLC Intell. Prop., LLC v. Micron Tech., Inc.*, 10 F.4th
5 1358, 1373 (Fed. Cir. 2021) (quoting *Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1309
6 (Fed. Cir. 2018)). Rather than separate out revenue attributable to Epic’s alleged use of
7 Utherverse’s patents, Ms. Riley relies primarily on the Ephere License to inform apportionment.
8 Dkt. 309 at 6-7. As Epic explained in its motion, even if the Ephere License were
9 technologically comparable, Ms. Riley cannot use it to inform apportionment because she fails to
10 analyze the facts underlying the Ephere License that relate to apportionment and she fails to
11 make adjustments to account for differences between those facts and the facts of the case at
12 hand. *See Id.* at 9-11. And the other purportedly “comparable transactions” Ms. Riley mentions
13 do not bear on apportionment because they are wholly untethered to either the technology of the
14 Asserted Patents or the incremental benefit Epic gained by allegedly employing that technology.
15 *See MLC*, 10 F.4th at 1373; *accord* Dkt. 309 at 11-12 (citing additional authority). Accordingly,
16 allowing this testimony would be contrary to law.

17 The R&R ends its analysis by determining that Ms. Riley establishes *baseline*
18 comparability of the Ephere License and then finding that she could rely on the “other
19 comparable” transactions to inform the royalty rate. R&R at 9-10. The R&R, however, does not
20 address the Federal Circuit precedent dictating that Ms. Riley cannot rely on the Ephere License
21 for “built-in apportionment” because Ms. Riley does not disclose or perform an analysis
22 considering the differences between the facts underlying the Ephere License on the one hand and
23 the Accused Events and Asserted Patents in this case on the other. Dkt. 309 at 9-11; *See Omega*
24 *Pats., LLC v. CalAmp Corp.*, 13 F.4th 1361, 1380 (Fed. Cir. 2021) (reliance on licenses for
25 “built-in apportionment” must be supported by a comparison of the license to the case at hand
26 and account for “distinguishing facts when invoking [the licenses] to value the patented
27 invention” (quoting *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1227 (Fed. Cir. 2014))).

1 The R&R's failure to address this central ground of Epic's motion should preclude the
 2 Court from adopting its recommendation. *See Adams v. Elfo*, No. C19-1263-JCC, 2020 WL
 3 1929375, at *2 (W.D. Wash. Apr. 21, 2020) (rejecting a report and recommendation that failed
 4 to acknowledge the objecting party's evidence and legal authority). And, for the reasons stated
 5 in Epic's motion and in its reply, permitting Ms. Riley to provide a damages calculation at trial
 6 that fails to limit damages to benefit of the alleged infringement would be reversible error. Dkt.
 7 309 at 2-5, 9-12; Dkt. 355 at 5-7; *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1329 (Fed. Cir.
 8 2014).

9 **C. The R&R Errs by Allowing Reliance on Ms. Riley's Supposed "Comparable**
 10 **Transactions."**

11 The R&R erroneously permits Ms. Riley to rely on miscellaneous data points to inform
 12 the reasonable royalty for which there is no evidence of technological comparability.
 13 Specifically, in finding that the Uthervers Digital source code license agreement and Epic's
 14 merchandising agreements "provide at least some indic[i]a of the appropriate initial royalty rate"
 15 in this case, the R&R does not grapple with the fact that these were not patent license agreements
 16 and cannot provide the required step of apportionment. R&R at 9. Epic therefore objects to
 17 these findings because allowing such testimony would be contrary to law. *See Pelican Int'l, Inc.*
 18 *v. Hobie Cat Co.*, No. 3:20-CV-02390-RSH-MSB, 2023 WL 2130379, at *26 (S.D. Cal. Feb. 10,
 19 2023) (excluding damages expert's reliance on a non-patent, brand-conferring license); *accord*
 20 Dkt. 309 at 11-12 (citing additional authority); Dkt. 355 at 4-5 (same). Epic also objects to the
 21 R&R's findings that Ms. Riley can rely on an internal Epic document and the IPSCIO industry
 22 report as a basis for her royalty rate opinion as contrary to law. R&R at 10. As the binding
 23 Federal Circuit law cited in Epic's briefing makes clear, there must be a basis to associate rates
 24 in prior transactions to the particular hypothetical negotiation at issue in the case. *See Uniloc*
 25 *USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011). The R&R cites no facts
 26 establishing such basis regarding the internal Epic document or the IPSCIO industry report.
 27 R&R at 10. Nor could it, as those pieces of evidence are also unrelated to apportionment or a

reasonable royalty rate in this case, as explained in Epic's briefing. Dkt. 309 at 11-12; Dkt. 355 at 4-5.

IV. CONCLUSION

The R&R should be rejected. Epic's *Daubert* motion to exclude the testimony of Michele Riley should be granted in full.

Dated: January 12, 2024

I certify that this memorandum contains 1,886 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2024 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Eric C. Wiener

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